



Department of Energy

Washington, DC 20585

JUL 11 2019

BY ELECTRONIC MAIL

Martin Pfeiffer
Graduate Assistant, Department of Anthropology
Scholar, National Security Studies Program
University of New Mexico
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Re: Case Nos. FIA-19-0020

FIA-19-0021

FIA-19-0022

FIA-19-0023

Request Nos. FOIA 19-00232-EW

FOIA-19-00237-EW

FOIA-19-00231-DD

FOIA-19-00234-M

Dear Mr. Pfeiffer:

The Department of Energy (DOE) has considered the four Freedom of Information Act appeals (collectively, the "Appeal") that you filed on June 27, 2019. As the enclosed Decision and Order indicates, the DOE has determined that the Appeal, Case Nos. FIA-19-0020-23, be granted.

If you have any questions regarding this Decision and Order, please contact Phillip Harmonick, Attorney-Advisor, at the Office of Hearings and Appeals, by electronic mail message at Phillip.Harmonick@hq.doe.gov or by telephone at (202) 287-1594.

Sincerely,

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Enclosure

cc:

Erica White, Esq.
Erica.White@nnsa.doe.gov



Department of Energy
Washington, DC 20585

United States Department of Energy
Office of Hearings and Appeals

In the Matter of Martin Pfeiffer)

Filing Date: June 27, 2019)

Case Nos.: FIA-19-0020
FIA-19-0021
FIA-19-0022
FIA-19-0023

Issued: JUL 11 2019

Decision and Order

On June 27, 2019, Mr. Martin Pfeiffer (Appellant) appealed four determination letters issued by the United States Department of Energy's (DOE) National Nuclear Security Administration (NNSA) denying his requests for categorization as an educational or noncommercial scientific requester for the purpose of assessing fees. The NNSA instead categorized Appellant as a commercial use requester. Appellant asserts that he is entitled to categorization as an educational, noncommercial scientific, or news media requester based on his organizational affiliations and prior work. As explained below, we grant the appeal.

I. Background

Appellant is a Ph.D. student in the Anthropology Department of the University of New Mexico. Appeal Ex. 3 at 1. Appellant's areas of study include "anthropology and history of nuclear weapons." *Id.* Appellant has submitted numerous FOIA requests to the NNSA in the past, and the NNSA categorized him as an educational or noncommercial scientific requester in connection with those prior requests. *See* Appeal at 1.

From June 17 – 25, 2019, the NNSA sent Appellant four letters notifying him that it had categorized him as a commercial use requester in connection with his outstanding FOIA requests for reports, meeting minutes, photographs, and other archival records on numerous topics dating back to the 1950s. Appellant filed four virtually identical appeals (collectively, the "Appeal") with the Office of Hearings and Appeals on June 27, 2019. Appellant argued in the Appeal that the NNSA's determination should be reversed because it had not provided any explanation for changing his requester categorization. Appeal at 1. In addition, Appellant asserted that he made the FOIA requests in connection with his Ph.D. research and that he should remain categorized as an educational or noncommercial scientific requester. *Id.* at 1–2. Alternatively, the Appeal argues that the NNSA could have categorized the Appellant as a member of the news media based upon his "making records [] publicly accessible; conducting public analysis on social media; and in [] writing for news, journalistic, scientific, and research outlets." *Id.* at 1. The Appellant provided a link to records he had uploaded to the Open Science Framework, a website that allows users to



store and share uploaded documents, as evidence that he made some records he had received through FOIA requests publicly available. *Id.* at 2.

On July 3, 2019, we contacted the NNSA regarding its categorization of the Appellant as a commercial requester. An NNSA representative directed our attention to an online account created by the Appellant through which he charged users for access to the documents he had requested from the NNSA since 2017. Martin Pfeiffer, *Martin Pfeiffer is creating Anthropologically informed nuclear weapons research and fun!*, PATREON (July 8, 2019), <https://www.patreon.com/nuclearanthro>. As of July 8, 2019, Appellant was generating over \$1,500 per month in user fees for access to the account. *Id.* The homepage of the account indicated that Appellant was collecting fees so as to reach his “break even point for being able to devote the necessary attention to creating, maintaining, and curating the publicly accessible digital collection of documents, photographs, and records that I have taken, scanned, and acquired through FOIA.” *Id.*

II. Analysis

A. NNSA’s Categorization of Appellant

The FOIA generally allows agencies to assess “reasonable standard charges for document search, duplication, and review.” 5 U.S.C. § 552(a)(4)(A)(ii)(I). However, the FOIA provides that agencies may charge only duplication fees “when records are not sought for commercial use and the request is made by an educational or noncommercial scientific institution, whose purpose is scholarly or scientific research; or a representative of the news media.” 5 U.S.C. § 552(a)(4)(A)(ii)(II).

DOE’s regulations implementing the FOIA provide that “[i]n determining whether a requester properly belongs in [the commercial use] category, [DOE] must determine how the requester will use the documents requested. Moreover, where DOE has reasonable cause to doubt the use to which a requester will put the records sought, or where that use is not evident from the request itself, the DOE will seek additional clarification before assigning the request to a specific category.” 10 C.F.R. § 1004.2(c). While the NNSA established reasonable cause to doubt Appellant’s assertions as to how he would use the requested records, the NNSA did not meet the procedural requirement of seeking additional clarification before categorizing Appellant as a commercial use requester. Therefore, we must remand this matter to the NNSA for further processing.

III. Order

It is hereby ordered that the appeals filed by Martin Pfeiffer on June 27, 2019, Nos. FIA-19-0020–23, are granted. This matter is hereby remanded to NNSA, which shall provide Appellant with the opportunity to clarify his intended use of the requested records in accordance with the above Decision.

This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the

district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

The 2007 FOIA amendments created the Office of Government Information Services (OGIS) to offer mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. Using OGIS services does not affect the right to pursue litigation. OGIS may be contacted in any of the following ways:

Office of Government Information Services
National Archives and Records Administration
8601 Adelphi Road-OGIS
College Park, MD 20740
Web: ogis.archives.gov Email: ogis@nara.gov
Telephone: 202-741-5770 Fax: 202-741-5769
Toll-free: 1-877-684-6448

A handwritten signature in blue ink, appearing to read "Poli A. Marmolejos".

Poli A. Marmolejos
Director
Office of Hearings and Appeals